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8 **UNITED STATES DISTRICT COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA**

10 DOMINIC BARTUCCIO, individually
11 and on behalf of all others similarly
12 situated,

13 Plaintiff,

14 v.

15 FITNESS INTERNATIONAL, LLC
16 D/B/A ESPORTA FITNESS,

17 Defendant.

18 Case No. _____

19 **CLASS ACTION**

20 **CLASS ACTION COMPLAINT**

21 Plaintiff Dominic Bartuccio, individually and on behalf of all others similarly
22 situated, complains and alleges as follows based on personal knowledge as to himself,
23 on the investigation of his counsel, and on information and belief as to all other matters.

24 **NATURE OF ACTION**

25 1. Plaintiff brings this Class Action Complaint for legal and equitable
26 remedies resulting from the illegal actions of Fitness International, LLC d/b/a Esporta
27 Fitness (“Defendant”) in sending automated telephonic sales calls, in the form of text
28 messages, to his cellular telephone and the cellular telephones of numerous other

1 individuals across Florida, in clear violation of the Florida Telephone Solicitation Act,
2 Fla. Sta § 501.059 (“FTSA”).

3 **JURISDICTION AND VENUE**

4 2. The Court has subject-matter jurisdiction over this action pursuant to 28
5 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate
6 amount in controversy exceeds \$5,000,000, exclusive of interest, fees, and costs, and
7 at least one Class member is a citizen of a state different from Defendant.
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9 3. Personal jurisdiction and venue are proper because Defendant maintains
10 its headquarters and principal place of business in Irvine, California, within this judicial
11 District.

12 **PARTIES**

13 4. Plaintiff is a resident and citizen of Florida. Plaintiff was at all times
14 mentioned herein the regular user of the telephone number (239) ***-7705 (the “7705
15 Number”).
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17 5. Defendant Fitness International, LLC d/b/a Esporta Fitness is the operator
18 of health clubs throughout the United States. Defendant is organized and incorporated
19 under the laws of California and maintains its corporate headquarters and principal
20 place of business in Irvine, California. Defendant is a “person” within the meaning of
21 Fla. Stat. § 501.059(8)(a).
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THE FLORIDA TELEPHONE SOLITITATION ACT

6. “Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints.” *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2343 (2020).

7. Thus, on July 1, 2021, to better protect its residents' privacy from intrusive calls and text messages, Florida enacted an amendment to the FTSA to prohibit, *inter alia*, the transmission of unsolicited sales calls and text messages to its residents' telephones.

8. As amended, the FTSA provides, in pertinent part: "A person may not make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party." Fla. Stat. § 501.059(8)(a).

9. “Telephonic sales call” is defined, in pertinent part, as a “telephone call [or] text message . . . to a consumer for the purpose of soliciting a sale of any consumer goods or services . . . or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services[.]” *Id.* § 501.059(1)(i).

1 10. “Prior express written consent” is defined, in pertinent part, as “a written
2 agreement that . . . [b]ears the signature of the called party[,] [c]learly authorizes the
3 person making or allowing the placement of a telephonic sales call by telephone call
4 [or] text message . . . to deliver or cause to be delivered to the called party a telephonic
5 sales call using an automated system for the selection or dialing of telephone
6 numbers[,] . . . [i]ncludes the telephone number to which the signatory authorizes a
7 telephonic sales call to be delivered[,] and [i]ncludes a clear and conspicuous disclosure
8 informing the called party that”:

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10 A. By executing the agreement, the called party authorizes
11 the person making or allowing the placement of a telephonic sales
12 call to deliver or cause to be delivered a telephonic sales call to the
13 called party using an automated system for the selection or dialing
14 of telephone numbers . . . ; and

15 B. He or she is not required to directly or indirectly sign the
16 written agreement or to agree to enter into such an agreement as a
17 condition of purchasing any property, goods, or services.

18 *Id.* § 501.059(1)(g).

19 11. “There is a rebuttable presumption that a telephonic sales call made to any
20 area code in this state is made to a Florida resident or to a person in this state at the
21 time of the call.” *Id.* § 501.059(8)(d)

22 12. Any person aggrieved by a violation of the FTSA may recover \$500.00
23 for each violation pursuant to § 501.059(10)(a), or up to \$1,500.00 for each violation
24 committed knowingly or willfully pursuant to § 501.059(10)(b).

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

13. Since July 1, 2021, Plaintiff has received, at the 7705 Number, at least one text message that Defendant made or knowingly allowed another person to make on its behalf.

14. For example, on or about February 1, 2022, Defendant made, or knowingly allowed to be made on its behalf, a text message to the 7705 Number that stated as follows:

Esporta Fitness Join Today! No enrollment fee and bring two guests every visit only \$25.99 month.

15. At the time the subject text messages were made to and received by Plaintiff, Plaintiff was “an actual or prospective purchaser, lessee, or recipient of consumer goods or services.” *Id.* § 501.059(1)(b).

16. The text messages that Defendant made or knowingly allowed another person to make on its behalf to Plaintiff's 7705 Number were sent to Plaintiff for the purpose of "soliciting a sale of . . . consumer goods or services" to Plaintiff, or "obtaining information [from Plaintiff] that w[ould] or m[ight] be used for the direct solicitation of a sale of consumer goods or services" to Plaintiff. *Id.* § 501.059(1)(b) & (1)(i).

17. Accordingly, the text messages that Defendant made or knowingly allowed another person to make on its behalf to Plaintiff's 7705 Number constituted "telephonic sales calls." Fla. Stat. § 501.059(1)(i).

1 18. Plaintiff is the “regular user of” the 7705 Number, and is therefore the
2 “called party” with respect to the subject text messages made by or on behalf of
3 Defendant to the 7705 Number. *See* Fla. Stat. § 501.059(1)(a).

4 19. Each text message sent by or on behalf of Defendant to Plaintiff’s 7705
5 Number originated from the telephone number (407) 577-9803, which is number leased
6 or owned by or on behalf of Defendant that Defendant uses or knowingly allows
7 another person to use to transmit telephonic sales calls, in the form of text messages,
8 to consumers in an automated and *en masse* fashion.

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10 20. Indeed, all telephone contact by Defendant or affiliates, subsidiaries, or
11 agents of Defendant to Plaintiff’s 7705 Number occurred using an “automated system
12 for the selection or dialing of telephone numbers” within the meaning of Fla. Stat. §
13 501.059(8)(a). Specifically, Defendant utilized an “automated system for the selection
14 or dialing of telephone numbers” to transmit the subject text messages to Plaintiff’s
15 7705 Number because such messages were sent from telephone numbers used to
16 message consumers *en masse*; because Defendant’s dialing equipment includes
17 features substantially similar to a predictive dialer, inasmuch as it is capable of making
18 numerous calls or texts simultaneously; and because the hardware and software used
19 by Defendant to send such messages have the capacity to both select numbers to be
20 dialed and to dial such numbers in an automated fashion. And indeed, Defendant (or
21 another person Defendant knowingly allowed to act on its behalf) actually transmitted
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1 the text messages at issue in this case to Plaintiff in an automated fashion, with
2 hardware and software that automatically selected and dialed Plaintiff's 7705 Number
3 and the other telephone numbers to which it transmitted such text messages.

4 21. Because Plaintiff's cellular phone alerts him whenever he receives a text
5 message, each telephonic sales call by or on behalf of Defendant to Plaintiff's 7705
6 Number invaded Plaintiff's privacy and intruded upon Plaintiff's seclusion upon
7 receipt.

8 22. Plaintiff has never provided his prior "prior express written consent" to
9 Defendant or any other party acting on Defendant's behalf to authorize the subject
10 telephonic sales calls to the 7705 Number by means of an "automated system for the
11 selection or dialing of telephone numbers" within the meaning of Fla. Stat. §
12 501.059(8)(a). Indeed, prior to making (or knowingly allowing another person to make
13 on its behalf) the subject telephonic sales calls to Plaintiff's 7705 Number, Defendant
14 lacked a signed written agreement with Plaintiff that complies with the requirements
15 of Fla. Stat. § 501.059(1)(g).

16 **CLASS ALLEGATIONS**

17 23. Class Definition. Plaintiff brings this civil class action on behalf of himself
18 individually and on behalf of all other similarly situated persons as a class action
19 pursuant to Federal Rule of Civil Procedure 23. The "Class" which Plaintiff seeks to
20 represent is comprised of and defined as follows:
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1 All persons in Florida who, at any time since July 1, 2021, received
2 a telephonic sales call made by or on behalf of Defendant using the
3 same type of equipment used to make telephonic sales calls to
4 Plaintiff.

5 24. Excluded from the class are Defendant, its officers and directors, members
6 of the immediate families of the foregoing, legal representatives, heirs, successors, or
7 assigns of the foregoing, and any entity in which Defendant has a controlling interest.

8 25. Plaintiff reserves the right to modify the definition of the Class (or add
9 one or more subclasses) after further discovery.

10 26. Plaintiff and all Class members have been impacted and harmed by the
11 acts of Defendant or its affiliates, agents, or subsidiaries acting on its behalf.

12 27. This Class Action Complaint seeks injunctive relief and monetary
13 damages.

14 28. Defendant or any affiliates, subsidiaries, or agents of Defendant have
15 acted on grounds generally applicable to the Class, thereby making final injunctive
16 relief and corresponding declaratory relief with respect to the Class as a whole
17 appropriate. Moreover, on information and belief, Plaintiff alleges that the FTSA
18 violations complained of herein are substantially likely to continue in the future if an
19 injunction is not entered.

20 29. This action may properly be brought and maintained as a class action
21 pursuant to Federal Rule of Civil Procedure 23(a) and (b). This class action satisfies
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1 the numerosity, typicality, adequacy, commonality, predominance, and superiority
2 requirements.

3 30. On application by Plaintiff's counsel for class certification, Plaintiff may
4 also seek certification of subclasses in the interests of manageability, justice, or judicial
5 economy.

6 31. Numerosity. The number of persons within the Class is substantial,
7 believed to amount to at least several thousand persons dispersed throughout Florida,
8 who collectively received at least tens of thousands of telephonic sales calls by or on
9 behalf of Defendant since July 1, 2021. It is, therefore, impractical to join each member
10 of the Class as a named plaintiff. Further, the size and relatively modest value of the
11 claims of the individual members of the Class renders joinder impractical. Accordingly,
12 utilization of the class action mechanism is the most economically feasible means of
13 determining and adjudicating the merits of this litigation.

14 32. Typicality. Plaintiff received at least one telephonic sales call from
15 Defendant since July 1, 2021 while in Florida, and Defendant lacks any record
16 establishing Plaintiff's "prior express written consent." Consequently, the claims of
17 Plaintiff are typical of the claims of the members of the Class, and Plaintiff's interests
18 are consistent with and not antagonistic to those of the other Class members he seeks
19 to represent. Plaintiff and all members of the Class have been impacted by, and face
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1 continuing harm arising out of, Defendant's FTSA-violative misconduct as alleged
2 herein.

3 33. Adequacy. As the proposed Class representative, Plaintiff has no interests
4 adverse to or which conflict with the interests of the absent members of the Class, and
5 he is able to fairly and adequately represent and protect the interests of such a Class.
6 Plaintiff has raised viable statutory claims of the type reasonably expected to be raised
7 by members of the Class and will vigorously pursue these claims. If necessary as the
8 litigation (including discovery) progresses, Plaintiff may seek leave to amend this Class
9 Action Complaint to modify the Class definition set forth above, add additional Class
10 representatives, or assert additional claims.

12 34. Competency of Class Counsel. Plaintiff has retained and is represented
13 by experienced, qualified, and competent counsel committed to prosecuting this action.
14 Plaintiff's counsel are experienced in handling complex class action claims, including
15 in particular claims brought under consumer protection and data-privacy statutes
16 similar to the FTSA.

18 35. Commonality and Predominance. There are well-defined common
19 questions of fact and law that exist as to all members of the Class and predominate over
20 any questions affecting only individual members of the Class. These common legal
21 and factual questions, which do not vary from Class member to Class member and may
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1 be determined without reference to the individual circumstances of any Class member,
2 include (but are not limited to) the following:

- 3 a) Whether Defendant made or knowingly allowed another person to make
4 the subject text messages to Plaintiff's and Class members' cellular
5 telephones;
- 6 b) Whether such text messages were sent using an "automated system for the
7 selection or dialing of telephone numbers" within the meaning of Fla. Stat.
8 § 501.059(8)(a);
- 9 c) Whether Defendant can meet its burden to show that it obtained "prior
10 express written consent" to transmit the subject text messages within the
11 meaning of Fla. Stat. § 501.059(1)(g), assuming such an affirmative
12 defense is timely raised;
- 13 d) Whether any of the violations of the FTSA committed by or on behalf of
14 Defendant were knowing or willful;
- 15 e) The amount of statutory damages to which Plaintiff and the Class are
16 entitled as a result of any violations of the FTSA committed by or on
17 behalf of Defendant; and
- 18 f) Whether Defendant or any affiliates, subsidiaries, or agents of Defendant
19 should be enjoined from engaging in such conduct in the future.

1 36. Superiority. A class action is superior to other available methods for the
2 fair and efficient adjudication of this controversy because the prosecution of individual
3 litigation on behalf of each Class member is impracticable. Even if every member of
4 the Class could afford to pursue individual litigation, the court system could not;
5 multiple trials of the same factual issues would magnify the delay and expense to all
6 parties and the court system. Individualized litigation would also present the potential
7 for varying, inconsistent or contradictory judgments. By contrast, the maintenance of
8 this action as a class action, with respect to some or all of the issues presented herein,
9 presents few management difficulties, conserves the resources of the parties and the
10 court system and protects the rights of each member of the Class. Plaintiff anticipates
11 no difficulty in the management of this action as a class action. Class wide relief is
12 essential to compel compliance with the FTSA and thus protect consumers' privacy.
13
14 The interests of Class members in individually controlling the prosecution of separate
15 claims is small because the statutory damages recoverable in an individual action for
16 violation of the FTSA are likewise relatively small. Management of these claims is
17 likely to present significantly fewer difficulties than are presented in many class actions
18 because the text messages at issue are all automated and because Defendant lacks any
19 record reflecting that it obtained the requisite prior express written consent from any
20 Class member to be sent such messages. Class members can be readily located and
21 notified of this class action by reference to Defendant's records and, if necessary, the
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1 records of Defendant's affiliates, agents, or subsidiaries and cellular telephone
2 providers.

3 37. Additionally, the prosecution of separate actions by individual Class
4 members would create a risk of multiple adjudications with respect to them that would,
5 as a practical matter, be dispositive of the interests of other members of the Class who
6 are not parties to such adjudications, thereby substantially impairing or impeding the
7 ability of such nonparty Class members to protect their interests. The prosecution of
8 individual actions by Class members could also establish inconsistent results and/or
9 establish incompatible standards of conduct for Defendant.

10

11 **CLAIM FOR RELIEF**
12 **VIOLATION OF THE FLORIDA**
13 **TELEPHONE SOLICITATION SALES ACT**
14 **(FLA. STAT. § 501.059)**

15 38. Plaintiff incorporates by reference the foregoing paragraphs of this Class
Action Complaint as if fully stated herein.

16 39. Since July 1, 2021, Defendant has made, or knowingly allowed to be made
17 on its behalf by another person, at least one text message to the 7705 Number, and
18 Plaintiff received such text messages in Florida. The 7705 Number is assigned an area
19 code that corresponds to a range of geographic locations in Florida.

20 40. Likewise, since July 1, 2021, Defendant has made, or knowingly allowed
21 to be made on its behalf by another person, at least one text message to each of the
22 telephone numbers regularly used by the members of the Class in Florida.

1 41. Because Plaintiff is, and at all relevant times referenced herein was, the
2 “regular user of” the 7705 Number, Plaintiff was the “called party” with respect to each
3 of the text messages made by Defendant (or knowingly allowed to be made on its behalf
4 by another person) to the 7705 Number.

5 42. Plaintiff is “an actual or prospective purchaser, lessee, or recipient of
6 consumer goods or services” within the meaning of the FTSA. *See* Fla. Stat. §
7 501.059(1)(b).

8 43. At least one of the text messages made by Defendant (or that Defendant
9 knowingly allowed to be made on its behalf by another person) to the 7705 Number
10 was made for the purpose of “soliciting a sale of . . . consumer goods or services” to
11 Plaintiff, or “obtaining information [from Plaintiff] that w[ould] or m[ight] be used for
12 the direct solicitation of a sale of consumer goods or services” to Plaintiff. *See id.* §
13 501.059(1)(b) & (1)(i). Accordingly, at least one of the subject text messages that
14 Defendant made or knowingly allowed another person to make on its behalf to
15 Plaintiff’s 7705 Number constituted a “telephonic sales call.” *Id.* § 501.059(1)(i).

16 44. Likewise, at least one of the text messages made by Defendant (or that
17 Defendant knowingly allowed to be made on its behalf by another person) to each of
18 the telephone numbers regularly used by the members of the Class was made for the
19 purpose of “soliciting a sale of . . . consumer goods or services” to the Class member
20 to whom the message was sent, or “obtaining information [from the Class member]
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1 that w[ould] or m[ight] be used for the direct solicitation of a sale of consumer goods
2 or services" to him or her. *See id.* § 501.059(1)(b) & (1)(i). Accordingly, at least one
3 of the subject text messages that Defendant made or knowingly allowed another person
4 to make on its behalf to each of the Class members' telephone numbers constituted a
5 "telephonic sales call." *Id.* § 501.059(1)(i).

6 45. Each of the telephonic sales calls made by Defendant (or that Defendant
7 knowingly allowed to be made on its behalf by another person) to Plaintiff's 7705
8 Number and to the Class members' telephone numbers occurred using an "automated
9 system for the selection or dialing of telephone numbers" within the meaning of Fla.
10 Stat. § 501.059(8)(a).

12 46. Prior to making or knowingly allowing another person to make on its
13 behalf the subject telephonic sales calls to Plaintiff and the members of the Class,
14 Defendant failed to obtain the "prior express written consent" from Plaintiff or any
15 member of the Class. Indeed, prior to making the subject telephonic sales calls to
16 Plaintiff's 7705 Number and to the telephone numbers regularly used by the members
17 of the Class, Defendant lacked a signed written agreement with Plaintiff or any Class
18 member that complies with the requirements of Fla. Stat. § 501.059(1)(g).

20 47. Plaintiff and all Class members are entitled to, and do seek, injunctive
21 relief prohibiting Defendant's future transmission of telephonic sales calls to the
22 telephone numbers regularly used by Plaintiff and the members of the Class absent

1 their prior express written consent pursuant to Fla. Stat. § 501.059(10)(a)(1), as well as
2 an award of \$500.00 in statutory damages for each violation of the FTSA committed
3 by or on behalf of Defendant pursuant to Fla. Stat. § 501.059(10)(a)(2) (or \$1,500 for
4 each such violation committed willfully or knowingly pursuant to Fla. Stat.
5 § 501.059(10)(b)).
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7 **PRAYER FOR RELIEF**

8 **WHEREFORE**, Plaintiff Dominic Bartuccio prays for relief and judgment in
9 favor of himself and the Class as follows:

10 A. Injunctive relief sufficient to ensure Defendant refrains from violating the
11 FTSA in the future pursuant to Fla. Stat. § 501.059(10)(a)(1);

12 B. Statutory damages of \$500.00 for himself and each Class member for each
13 of Defendant's violations of the FTSA (or \$1,500.00 for each such violation to the
14 extent committed willfully or knowingly) pursuant to Fla. Stat. § 501.059(10)(a)(2) &
15 (10)(b);

16 C. An Order certifying this action to be a proper class action pursuant to
17 Federal Rule of Civil Procedure 23, establishing an appropriate Class and any
18 Subclass(es) the Court deems appropriate, finding that Plaintiff is a proper
19 representative of the Class, and appointing the attorneys representing Plaintiff as
20 counsel for the Class; and

1 D. An award of attorneys' fees and costs to Plaintiff's counsel pursuant to
2 Fla. Stat. § 501.059(11) and Federal Rule of Civil Procedure 23.

3 **DEMAND FOR JURY TRIAL**

4 On behalf of himself and all others similarly situated, Plaintiff demands a trial
5 by jury pursuant to Federal Rule of Civil Procedure 38(b) on all claims and issues so
6 triable.

7 Dated: January 24, 2023

HEDIN HALL LLP

8 By: /s/ Frank S. Hedin
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